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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSH HALL,

Defendant.

Case No.: CR 10-229 BR

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT, JOSH HALL'S OBJECTION
TO DEFENDANT VAN BEENEN'S
MOTION TO SEAL AND MOTION FOR
PROTECTIVE ORDER

Through his counsel, Defendant, Joshua Hall (Hall) , submits the following points and authorities in support of his objection to Defendant Van Beenen's (Van Beenen) motion to seal and motion for protective order.

1. Van Beenen's motions rest upon unsworn factual assertions of his defense counsel, Thomas Coan, in his pleadings and memorandum. Except with the limited issue discussed in paragraph 2 below, Hall stipulates that the Court can accept Mr. Coan's factual assertions as having been proven without the need for testimony by Mr. Van Beenen, Ms. Castro, Ms. Anderson or AUSA Kerin. For purposes of these motions, Hall agrees that during the relevant time period, Ms. Castro, was a defense investigator and as such was an agent of Van Beenen's counsel and Hall stipulates that Van Beenen inadvertently disclosed a communication he intended to be confidential to

1 – MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
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1 a third party.

2 2. Hall agrees that the legal precedent Van Beenen cites in his memorandum
3 accurately outlines the law applicable to the federal attorney-client privilege and
4 inadvertent waiver of that privilege. Hall is unsure whether the attorney-client privilege
5 extends to Van Beenen's confidential communications with an agent employed by his
6 counsel for purposes other than providing legal advice. In his memorandum, Van
7 Beenen asserts: "The attorney-client privilege may extend to communications with third
8 parties who have been engaged to assist the attorney in providing legal advice. *United*
9 *States v. Richey*, 632 F.3d 559, 566 (9th Cir. Idaho 2011), citing *Smith v. McCormick*,
10 914 F.2d 1153, 1159-60 (9th Cir. 1990)." Van Beenen does not include footnote 3 to his
11 quotation from *Richey*, or the sentence which follows that quotation. Footnote 3
12 provides:

13 "See *Smith v. McCormick*, 914 F.2d 1153, 1159-60 (9th Cir. 1990) (concluding
14 that defendant's communication with her psychiatrist was protected up to the
15 point of testimonial use of that communication)." "What is vital to the privilege is
16 that the communication be made in confidence for the purpose of obtaining *legal*
17 *advice from the lawyer.*" *United States v. Gurtner*, 474 F.2d 297, 299 (9th Cir.
1973) (emphasis in original) (quoting *United States v. Kovel*, 296 F.2d 918, 922
(2d Cir. 1961)."

18 The sentence which follows the Richey quotation states: "[i]f the advice sought is not
19 legal advice, but, for example, accounting advice from an accountant, then the privilege
20 does not exist." It is apparent that the attorney-client privilege concerns the giving and
21 receiving of legal advice whether to counsel or to a person employed by counsel for that
22 purpose. It is not axiomatic that Christina Castro is an agent employed by defense
23 counsel to provide legal advice such that Van Beenen's confidential communications to
24 her are subject to the attorney-client privilege.

1 In *United States v. Nobles* 8212, 634, 422 U.S. 225, 239, 95 S.Ct. 2160, 45
2 L.Ed.2d 141 (1975), the Supreme Court discusses the policies underlying the federal
3 work-product doctrine, and notes:

4 “One of those realities is that attorneys often must rely on the assistance of
5 investigators and other agents in the compilation of materials in preparation for
6 trial. It is therefore necessary that the doctrine protect material prepared by
7 agents for the attorney as well as those prepared by the attorney himself.
8 Moreover, the concerns reflected in the work-product doctrine do not disappear
9 once trial has begun. Disclosure of an attorney's efforts at trial, as surely as
10 disclosure during pretrial discovery, could disrupt the orderly development and
11 presentation of his case.”

9 As the Supreme Court notes in footnote 11, citing to *Hickman v. Taylor*, 329 U.S. 495,
10 508, 67 S.Ct. 385, 91 L.Ed. 451 (1947), the work-product privilege and attorney-client
11 privilege are distinct doctrines. Nevertheless, because this Court has broad discretion
12 over discovery and evidentiary matters at trial, and because the basic policies at issue
13 seem related, Counsel brings this case to the attention of Court and counsel.

14 3. According to Van Beenen's memorandum, he did not advise his counsel
15 of the inadvertent disclosure. Instead, counsel learned of the disclosure from counsel
16 for the Government approximately two weeks later. Hall requests that the Court rule on
17 whether Van Beenen's failure to bring the inadvertent disclosure to the attention of his
18 trial counsel establishes a failure to “promptly” take reasonable steps to rectify the error.
19 FRE 502(b). On the issue of prejudice, as noted above, Hall's defense counsel has
20 never seen the emails and obviously did not rely upon them to his detriment.
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22 4. Hall recognizes that he has no right to compel release of the email from
23 Van Beenen. Any right he might have would come from the Government's discovery
24 obligations under FRCrP 16 *et. seq.* While Defendant Hall has no general constitutional
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1 right to discovery (See *Weatherford v. Bursey*, 429 U.S. 545, 51 L.Ed.2d 30, 97 S.Ct. 837
2 (1977)), he does have a fundamental due process right to request and obtain evidence
3 that is material to guilt or relevant to punishment. *California v. Trombetta*, 467 U.S. 479,
4 485, 104 S. Ct. 252, 881 L. Ed. 2d 413 (1984). Hall requests that the Government
5 disclose the emails to him under Rule 16 and pursuant to his fundamental due process
6 right to defend these criminal charges.

7 5. In the event that this Court determines that the emails are protected by the
8 attorney-client privilege, Defendant Hall's counsel requests leave to review them so that he
9 can make an appropriate record on how, if at all, they would be utilized as exculpatory
10 evidence during his defense.

11 Dated: May 11, 2011.

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13 */s/ Noel Grefenson*

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15 Noel Grefenson, OSB No. 88216
16 Attorney for Defendant Hall
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